PEMBINAAN NADZRI SDN. BHD.

v.

KOON HOE CO. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL KADIR MUSA JC
[CIVIL APPEAL NO. R3-12-243-95]
1 JUNE 1996

CIVIL PROCEDURE: *Appeal - Appeal to Judge in Chambers arising from application under O. 26A Subordinate Courts Rules 1980 - Record of Appeal - Whether appeal record to contain memorandum of appeal - Failure to file memorandum - Whether appeal record rendered incomplete and defective - Whether violated O. 55 r. 2 Rules of High Court 1980 - Subordinate Courts Rules 1980 O. 26A, O. 49 rr. 2, 3, 6(1),(2) & (3) - Rules of High Court 1980 O. 55 r. 2.*

CIVIL PROCEDURE: *Appeal - Appeal to Judge in Chambers arising from summary application in Subordinate Court - Record of appeal - Need for filing memorandum - Order 55 r. 2 Rules of High Court 1980 - Whether to be complied with - Whether need for filing memorandum dispensed with by O. 49 r. 6(3) Subordinate Courts Rules 1980 - Whether appellant need only to comply with r. 6(2) & (3) thereof.*

CIVIL PROCEDURE: *Order 49 r. 6 Subordinate Courts Rules 1980 - Order 55 r. 2 Rules of High Court 1980 - Filing of memorandum of appeal in appeal record - Legislative intentions - Proper effect of interaction of the Orders - Whether O. 55 r. 2 abrogated by O. 49 r. 6(3).*

The respondent had applied for summary judgment under O. 26A Subordinate Courts Rules 1980 (SCR). Before the learned Sessions Judge, the appellant took out a preliminary objection contending that the application was vitiated by delay, and that the pleadings and statement of claim did not disclose a reasonable cause of action. The objection was dismissed and the appellant hence appealed.

Pursuant to O. 49 r. 6(3) SCR, the appellant filed in the High Court the notice of appeal, and consequently the record of appeal. As it was, the appeal record did not contain any memorandum of appeal (memorandum), such filing having been dispensed with by r. 6(3). Rule 6(3) apart, however, O. 55 r. 2 Rules of the High Court 1980 (RHC) required that a memorandum be filed together with the appeal record. Such being the circumstance, before the learned Judicial Commissioner, the respondent raised a preliminary objection that the appeal was incomplete and defective, having violated the said O. 55 r. 2. Counsel for the respondent, hence, urged for the dismissal of the appeal, and in consequence

cited *Yupaporn Seangarthit v. Neil Allan Camphell Webb* [1995] 1 CLJ 43. The appellant contended that O. 55 r. 2 RHC applied only to appeals brought under rr. 2 and 3 of O. 49 SCR in matters arising from full trials, and so, had nothing to do with interlocutory application such as the one instituted in this appeal.

It was not in dispute that in *Yupaporn*, the Court of Appeal, endorsing the finding of Richard Malanjum J. in *Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors. v. UMW (Sarawak) Sendirian Berhad* [1995] 1 CLJ 113, *inter alia* ruled that O. 49 r. 6(3) SCR did not abrogate O. 55 r. 2 RHC, and that, notwithstanding the said r. 6(3), a memorandum in accordance with O. 55 r. 2 RHC ought to be filed in all appeals flowing from O. 26A SCR applications. Before the learned Judicial Commissioner, the issues that arose were:

(1) Whether, bearing in mind the judgments in *Yupaporn* and *Syarikat Kayu Bersatu*, and the maxim of *stare decisis*, the appellant was bound to comply with the requirement of O. 55 r. 2 RHC.

(2) Whether O. 55 r. 2 RHC applied only to appeals brought under rr. 2 and 3 of O. 49 SCR in matters arising from full trials, and so, was irrelevant to the interlocutory application herein.

(3) Whether O. 49 r. 6 SCR was a special procedure that catered specifically to appeals from decisions of interlocutory applications, and as such, would operate independently of O. 55 r. 2 RHC.

Held:

[1] The observation by the Court of Appeal in *Yupaporn* when referring to *Syarikat Kayu Bersatu* that "*the issue is admirably covered by Richard Malanjum J"* and that *"We entirely agree with what he has said"* brought forth the inference that the learned Judge in *Syarikat Kayu Bersatu* had dealt at length with the effect of O. 49 r. 6(3) SCR in relation to O. 55 r. 2 RHC when deciding the case.

[2] With utmost respect, however, this Court should not blanketly accept the principle of *stare decisis* if the said decision in *Syarikat Kayu Bersatu* could be distinguished, or that the effect of the interaction of the two Orders was found to have not been adequately dealt with by the learned Judge. It must be so as it is not the decision of the Court of Appeal, but a decision of another High Court, that this Court is seeking to distinguish or disagree with.

[3] In *Syarikat Kayu Bersatu,* while it it true that substantive arguments on the two Orders had been placed before him, the learned Judge specifically stated that *"no view of this Court has been expressed on*

the arguments of the parties on the substantive issues". And although the learned Judge did say, while referring to O. 49 r. 6, that *"I do not think that the provision should be interpreted to mean that the other provisions of O. 55 of RHC 1980 should be ignored*", his conclusion was not followed by any discussion as to which of the said *"other provisions of O. 55"* that should not be ignored. In the circumstances, this Court can only conclude that the learned Judge had not adequately dealt with the two Orders aforesaid. It is thus difficult for this Court to accept the view as expressed by the learned Judge therein.

[4] In any case, assuming that the learned Judge in *Syarikat Kayu Bersatu* had dealt with the two Orders at length, his conclusions thereof were flawed in that they were not in conformity with the legislative intentions of the two Orders.

[5] Both the RHC and the SCR, drafted as they were by the Rules Committee, have statutory force and are not mere rules of practice. This being the case, the procedural requirements of the SCR, just like those of the RHC, ought to be strictly complied with. This is in line with the principle that where the law provides a particular method or form of procedure, strict compliance with the provisions is called for.

[6] The legislative intents of the Orders ought to be seen in the context of O. 49 prior to its amendment in 1993. As it was, prior to the introduction of rule 6 to O. 49 SCR (which came into force on 1 August 1993 vide. PU(A) 193/93), the procedure for appeals from Subordinate Courts to High Court was governed by O. 49 rr. 2 and 3, irrespective of whether an appeal arose from a "full trial" or out of "summary proceedings". In that context, it was incumbent upon the lower Court, upon the filing of a notice of appeal in Form 140, to follow up with Form 141 and supply to the appellant both the grounds of judgment and the notes of evidence. In other words rr. 2 and 3 of O. 49 ought to be complied with. It is in relation to this that O. 55 r. 2(1) RHC stipulates that the memorandum ought to be filed within 14 days of receipt of Form 141 under rr. 2(4) or 3(4) of O. 49 SCR. This must have been the legislative intention of the interaction between O. 49 r. 6 SCR and O. 55 r. 2 RHC, and failure to comply with the intention would certainly render the appeal record defective.

[7] By O. 55 r. 2 RHC, the need to file the memorandum only applies to appeals arising from matters in relation to O. 49 rr. 2(4) and 3(2) of the SCR where Form 141 has to be issued by the Subordinate Court pursuant to the filing of the notice of appeal in Form 140. In practice, however, since the amendment to O. 49 SCR, the Court concerned would inform the appellant that neither the notes of evidence nor the grounds of judgment would be issued to the appellant. In other words,

Form 141 would not be issued by such Court. Without being supplied with such materials, it cannot be visualised how an appellant could prepare a memorandum, save aside to file the same as required by O. 55 r. 2.

[8] Rule 6(1) of O. 49 SCR enables an appeal to be made to a Judge in Chambers *"from any decision made by the lower Court other than a decision made after trial"*, and the words *"this order"* therein refer to O. 49 itself including all the rules thereunder. This being the case, the phrase *"Notwithstanding anything contained in this Order"* in the rule could only mean that, notwithstanding that there were requirements stipulated in any other rules in O. 49 prohibiting an appeal from being heard, so long as there was compliance with the requirements of rr. 6(2) and 6(3) and that the appeal intended to be heard is one which resulted from a decision *"other than a decision made after trial"*, r. 6(1) has licensed that such an appeal should still be heard by a Judge in Chambers. This is the clear intention of O. 49 r. 6(1) SCR and any other construction would only nullify the true purport and effect of the rule.

[9] It ought also to be noted that r. 6(1) of O. 49 speaks of *"any decision"* made by the lower Court *"other than a decision made after trial"*. Rule 6(1) thus addresses itself to all interlocutory decisions, be it from preliminary objection (as is the case here) or decisions where full submission on merit has been made and heard.

[10] Rule 6 of O. 49 SCR, in the upshot, has provided a special procedure relating to appeals against "summary" or "interlocutory" decisions of a Subordinate Court, independent from those referred to either by r. 2(4) or 3(2) of O. 49 SCR. This "special mode of procedure" clearly dispenses with the need to issue the notice in Form 141, and hence the requirement to file the memorandum as reflected by sub-rule (3) of r. 6 SCR. Consequently, all the appellant has to do is to comply strictly with the requirements of rr. 6(2) and 6(3) of O. 49 for his appeal to be heard by a Judge in Chambers under sub-rule (1) of the same rule. This being the case, applying the maxim *"generalibus specilia derogant"*, it follows that the legislative intention of r. 6 of O. 49 after 1 August 1993 must also be such as to exclude the operation of either r. 2(4) or 3(2) of that Order.

[12] With utmost respect to Richard Malanjum J., there is certainly no need to file the memorandum in respect of any appeal arising from an O. 26A SCR application after 1 August 1993. In the circumstances, the question of "abrogating the requirement of O. 55 r. 2 RHC" by not filing the memorandum in relation to O. 49 r. 6(3) SCR does not arise at all. And it follows that, since the disagreement of this Court is with the the learned Judge's analysis of the substantive issue which was fully

endorsed by the Court of Appeal in *Yupaporn*, the question of whether or not this Court is bound by the principle of *stare decisis* also does not arise.

[Preliminary objection of respondent disallowed]

Cases referred to:

Yupaporn Seangarthit v. Neil Allan Campbell Webb [1995] 1 CLJ 43; [1995] 3 MLJ 705 ***(refd)***

Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors. v. UMW (Sarawak) Sendirian Berhad [1995] 1 CLJ 113 ***(not foll)***

Siang Galau v. Ang Wak Hiong [1994] 1 CLJ 82; [1994] 1 MLJ 42 ***(not foll)***

Kemajuan Hunda Kredit (Kuching) Sdn. Bhd. v. Titus Chuo Mui Ing [1995] 2 MLJ 542 ***(refd)***

Koperasi Serbaguna CEUPACS Terengganu Bhd. v. Investments Sdn. Bhd. [1983] 2 MLJ 33 ***(foll)***

Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd [1958] 24 MLJ 113 ***(foll)***

Pacific Centre Sdn. Bhd. v. United Engineering (Malaysia) Bhd. [1984] 2 MLJ 143 ***(foll)***

PP v. Chew Siew Luan [1992] 2 MLJ 119 ***(refd)***

Citibank N.A. v. Lee Chew Keok (f) & Anor ***(refd)***

Luggage Distributors (M) Sdn. Bhd. v. Tan Har Teng @ Tan Tien Chi & Anor. [1995] 2 AMR 969 ***(refd)***

Legislation referred to:

Rules of High Court 1980, O. 55 rr. 2, 2(1)

Subordinate Courts Rules 1980, O. 49 rr. 2, 2(3), 2(4), 3, 3A, 3(2), 3(4), 6, 6(1), 6(2), 6(3)

For the appellant/defendant - David Mathews; M/s. Cheah Teh & Su
For the respondent/plantiff - PC Chew; M/s. Kwong & Allan

JUDGMENT

Abdul Kadir Musa JC:

This is an appeal against the Sessions Court decision dated 25 September 1995 by the appellant/defendant in relation to the respondent/plaintiff's O. 26A Subordinate Courts Rules, 1980 application dated 18 May 1995 (pages 17 and 18 of the record of appeal, enclosure (3)). The said decision was made after the learned Sessions Court Judge had considered the preliminary objection by the appellant/defendant in respect of the said application on 2 grounds. The two grounds are:

(i) the respondent/plaintiff was late in filing the aforesaid application; and

(ii) that their pleadings and or the Statement of Claim did not disclose a reasonable cause of action against the appellant/defendant.

On appeal before me on 13 February 1996, the appellant was represented by Encik David Mathews, and the respondent by Cik P.C. Chew.

At the commencement of the hearing of the appeal, Cik Chew raised a preliminary objection in respect of the record of appeal (enclosure (3)) in the light of the case of *Yupaporn Seangarthit v. Neil Allan Campbell Webb* [1995] 3 MLJ 705. That being so, both the learned Counsels agreed that, the said issue needed to be answered first. They also agreed that, if the said objection stands then the appeal should be dismissed with costs. On the other hand, if the Court rejected the said objection, only then will they proceed to argue the substantive appeal. I agreed with that proposal.

In substantiating the preliminary objection raised, Cik Chew submitted that, there was no dispute that the memorandum of appeal ("The Memo") was not filed. Failure to do so she submitted, though on the surface of it, was not in breach of O. 49 r. 6(3) of the Subordinate Courts Rules, 1980 ("the SCR"), must still be construed as non-compliance with the requirements of O. 55 r. 2 of the Rules of the High Court, 1980 ("the RHC"), based on the *Yupaporn's* case, *supra*. To support her contention, she relied and quoted page 708 of the said case, which states as follows:

> Although O. 49 r. 6(3) could have been more clearly worded, it cannot be understood to mean that it has abrogated the requirement of O. 55 r. 2 of the RHC.

and argued that, even though O. 49 r. 6(3) of the SCR does not require the Memo to be filed, it has not abrogated the requirement of O. 55 r. 2 of the RHC.

To enhance her contention, she also relied on the case of *Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors. v. UMW (Sarawak) Sendirian Berhad* [1995] 1 CLJ 113, where it was held that O. 55 r. 2 of the RHC should not be ignored, and its requirement to file the Memo must be complied with. The filing of the Memo, according to her, was an essential part of the appeal procedure based on the authority of the case of *Siang Galau v. Ang Wak Hiong* [1994] 1 MLJ 42. At page 44 para (I), of the said *Siang Galau's* case, it stated as follows:

> **It must be recognised that the filing and service of the Memo constitute an essential part of the appeal procedure**. Order 55 r. 4(3) of the RHC provides that if the (Memo) is not filed or served within the prescribed time and no sufficient ground is shown for the delay, the appeal **may** be dismissed. (Emphasis added)

In conclusion, she urged the Court, based on those cases, to allow her preliminary objection, and dismissed the appeal with costs.

In reply, Encik David submitted that O. 49 r. 6(3) SCR had to be carefully examined in the light of the said *Yupaporn's* case. It was his contention that if so done, it became apparent that the aforesaid case should not be applicable to, if not all, appeals arising from O. 26A of the SCR. It was his stand that

O. 49 r. 6(3) is an independent provision governing appeal from decision of interlocutory application, and specifically tailored to cater to such application.

It was also strongly emphasized by Encik David that, O. 55 r. 2, applies to only appeals brought under O. 49 rr. 2 and 3 of the SCR in respect of matters arising from full trial, as opposed to interlocutory applications. In support, he quoted and relied on the cases, of (i) *Kemajuan Hunda Kredit (Kuching) Sdn. Bhd. v. Titus Chuo Mui Ing* [1995] 2 MLJ 542, and (ii) *Koperasi Serbaguna CUEPACS Terengganu Bhd. v. City Investments Sdn. Bhd.* [1983] 2 MLJ 33. Based on those two cases, amongst others, he urged the Court to disallow the respondent's preliminary objection.

After careful consideration of both submissions, I was propelled to accept the gist of Encik David's submission in preference to that of Cik Chew for the reasons I shall endeavour to render below.

From Cik Chew's submission, it was obvious that heavy reliance was placed by her to the words " ... (O. 49 r. 6(3)) has (not) abrogated the requirement of O. 55 r. 2 of the RHC" in the *Yupaporn's* case, *supra*. However, with respect to her, what was perhaps not appreciated by her was the observation of the Court of Appeal when it stated as follows:

> The issue is admirably covered in *Syarikat Kayu Sdn. Bhd. & Ors. v. UMW (Sarawak) Sdn. Bhd.* [19951 1 CLJ 113, by Richard Malanjum J. We entirely agree with what he has said.

From the above observation, I could draw two inferences which require and justify further analysis before any ruling can be made whether or not to allow Cik Chew's objection. They are:

(i) The issue is admirably covered ... by Richard Malanjum J.;

and

(ii) That (the appellate Court) entirely agree (d) with what he has said (in that case).

Those two inferences led me further to infer that Mr. Justice Richard Malanjum must have dealt at length the effect O. 49 r. 6(3) of the SCR in relation to O. 55 r. 2 of the RHC when deciding the *Syarikat Kayu Bersatu's* case *supra*. It must have been upon his Lordship's reasons, and nothing else, that the appellate Court agreed with him, and held that the Memo, in all appeals flowing from all O. 26A SCR applications, must be filed in accordance with the requirements of O. 55 r. 2.

At this juncture, permit me to emphatically stress here that, since *Yupaporn's* case, *supra,* is the decision of the Court of Appeal, and the main issue decided thereto was an appeal arising from O. 26A SCR application, unless and until the said decision has been overruled by higher Court or distinguished by a

Court of co-ordinate jurisdiction, I am bound to follow that decision based on the principle of *"stare decisis"*. Entertaining that fact, I am of the most humble view and stand to be corrected by the Higher Court, I should not blanketly accept the principle of *"stare decisis"* if it can be demonstrated that, Mr. Justice Richard Malanjum's decision can be distinguished, and or shown not to have been adequately dealt with in relation to the effect(s) of the aforesaid two Orders. It must be so, because it is not the decision of the Appellate Court that I am distinguishing, but a decision of another High Court sitting in Sarawak. It is with that in mind, that I will endeavour to distinguish the said *Syarikat Kayu Bersatu's* case with what I consider as to how those two Orders ought to be viewed, and consequentially the necessary ruling(s) as to Cik Chew's objection.

In the said *Syarikat Kayu Bersatu's* case, it is true that the substantive arguments on those two said Orders were placed before Mr. Justice Malanjum for his consideration. However, at page 116, of his decision, he specifically stressed, in relation to that substantive arguments, the following words:

> It is to be noted that **no** view of this Court has been expressed on the arguments of the parties on the substantive issues. ... **if I were to consider this appeal as it stands** then it is obvious that **in view of the absence of the memorandum of appeal it may be dismissed summarily**. But I do not think that it is being fair to the appellants especially when no notification in Form 141 has been issued. (Emphasis is added).

Having said that, his Lordship then directed the Sessions Court which heard the O. 26A application and the appellant to first comply with the procedural requirements, and thus adjourned the hearing to another date to be fixed. "The procedural requirement" his Lordship was referring to was O. 49 r. 6 of the SCR, including those referred to in sub-rule (3) of r. 6 of the same Order.

For easy perusal and convenience, the said O. 49 r. 6(3) provides:

> (3). Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain of:
>
> (a) the application for the decision;
>
> (b) the statement of claim, and the statement of defence;
>
> (c) all affidavit filed in support of or in opposition to the application; and
>
> (d) the decision appealed from,
>
> **but shall not include the notes of evidence, the ground judgment or any memorandum of appeal.** (Emphasis added)

Clearly O. 49 r. 6(3), excludes specifically the need to include in the record of appeal that is needed to be filed in the High Court three matters. They are:

(i) notes of evidence;

(ii) the grounds of judgment, or

(iii) any memorandum of appeal.

That fact was well recognised by Mr. Justice Richard Malanjum.

However, while entertaining that fact, his Lordship also noted that there was no reciprocal provision for O. 49 r. 6 of the SCR, to be found under O. 55 of the HCR which deals with appeals to the High Court from the Subordinate Courts and statutory bodies. The reason he put forward for such absence was, in his Lordship's own words, at page 115, para (e), of the aforesaid case, were as follows:

> ... there appears to be no necessity to have such a reciprocal provision in the RHC 1980. But the flaw of that reasoning is that **there was no legal basis to allow the provisions of SCR 1980 to govern the proceedings in the High Court. After all the SCR 1980 is intended for the proceedings in the Subordinate Courts. (see O. 1 r. 2 of the Subordinate Courts Rule 1980; s. 4 of the Subordinate Courts Act 1955).** (Emphasis added).

It must have been for that reason that he was of the view that, under O. 49 r. 6 and by virtue of the requirement of r. 2 of the same Order, it was therefore necessary that notice under Form 141 should be issued by the Court appealed from. Since the appellant must also comply with the relevant provisions under O. 55 of the RHC, the filing of the memorandum of appeal, according to his Lordship, was therefore necessary. Hence, he held, at page 116, para (a), in the same case, as follows:

> So even though O. 49 r. 6 specifically excluded any memorandum of appeal I do not think that the provision should be interpreted to mean that the other provisions of O. 55 of RHC 1980 should be ignored;

and stopped there. He did not discuss, for example, at least briefly, which "other (relevant) provisions (of O. 55) of RHC 1980" that should not be ignored. Without that benefit, other than what was expressed by his Lordship as stated above, I find it very difficult to accept and adopt his view and to allow Cik Chew's objection. Merely as an observation, unless there was a typing error, there is no Subordinate Courts Act 1955.

Flowing from the above discussion, the main conclusion that I can draw is that, it is not a question of whether Mr. Justice Richard Malanjum's decision was right or wrong, but more accurately, the search for the answer(s) should be whether or not the two aforesaid Orders referred to by his Lordship were

adequately dealt with by him. Secondly, if it was done, then whether or not it was examined and concluded in line and parallel with the true legislative intention of those two said Orders. With the greatest of respect to his Lordship, I was and am compelled to state here that in both instances, the answers are, in my most humble and considered conclusion, in the negative. Why?

It cannot be denied that both the HCR and SCR are subsidiary legislations within the meaning of s. 3 of the Interpretation Act, 1967. As such, they have statutory force and are not mere rules of practice. I find my support in the case of *Pacific Centre Sdn. Bhd. v. United Engineering (Malaysia) Bhd.* [1984] 2 MLJ. 143, whereby at page 144, it was held that:

> (2) the Rules of High Court have statutory force and not merely rules of practice.

Both the HCR and SCR were drafted by the appropriate relevant Rule Committees. Thus, if the HCR has a statutory force, it follows that the SCR too should have the same effect. Since it, the SCR, is such, its procedural requirements must therefore be strictly complied with. This principle has been observed by Rigby J in 1958 in the case of *Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] 24 MLJ 113, whereby his Lordship held that:

> (1) Where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, ... (Emphasis added).

Even though the *Pelajaran National's* case, *supra*, was decided on the question of setting-aside a judgment obtained in default, the underlining principle is equally applicable to the appeal before me. If that principle is applied, it will thus be in harmony with legislative intention of having those relevant provisions in SCR drafted by the Rules Committee. If it is not viewed that way, it will amount to total disregard to such legislative intention, and will therefore be in conflict with a well known principle of giving the true effect to a particular statute or any subsidiary legislation, such as SCR, which must be interpreted in the context in which it appears. I am well supported in that respect by the then Federal Court case of *PP v. Chew Siew Luan* [1992] 2 MLJ 119.

In the said *Chew Siew Luan's* case. Raja Azlan Shah CJ (Malaya) (as he then was), at page 120, said:

> ... it is a sound, and, indeed, a well known principle of construction of a statute that **the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear.** .... we should perhaps also observe *'en passant'* that **any other construction would result in nullifying the purport and effect of the (particular) provisions** ... (Emphasis added).

From the above, it is therefore necessary to examine O. 49, SCR more closely to determine the legislative intention of any relevant "purport of words and expressions used" in that Order, and to avoid "any other construction (which) would result in nullifying the purport and effect of the [said Order] ... "

Order 49 r. 6(l), SCR provides:

> (1) **Notwithstanding anything contained in this Order, an appeal lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.**
>
> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice ... to the Registrar of the High Court.
>
> (3) **Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court** ... (Emphasis added).

Guided by those cases discussed earlier, my humble conclusions from the above are, *inter-alia,*

(1) that certain words and or phrases used thereto certainly need further dissection;

(2) the said dissection is requited in order to determine the true legislative intention of the said Order;

(3) to avoid any conflict with the true legislative intention of the said Order; and to have the result of such examination applied to the *Syarikat Kayu's* case, supra., to determine whether or not it fitted and is in line with the discussion above.

In my most humble and considered opinion, only when those considerations are taken into account and the decision is still the same as that decided by Mr. Justice Richard Malanjum, will it enable me to justiciably conclude that, I have no reason to disagree with his Lordship's findings and or conclusions; otherwise I am allowed in law to disagree with him. Having said that, permit me to examine and discuss further of what I have summarised above.

In O. 49 r. 6(l), the words "this Order" can be found. "This Order" must therefore be "O. 49" SCR, which includes all the rules thereunder and that will encompass rr. 1 and 2 of the said Order. Rule 6(l), specifically enables an appeal to be made to a Judge in Chambers "from any decision made by the lower Court". The "decision" the said r. 6(l) is referring to is that, "other than a decision made after trial". By the presence of the phrase "Nothwithstanding anything contained in this Order", in the said rule, simply means that, should any of the requirements stipulated in any other rules in O. 49 which prohibits or prevents an appeal from being heard, so long as it complies with other requirements stated in sub-rules (2) and (3) of r. 6 and

that the appeal intended to be heard is one which resulted from a decision "other than a decision made after trial", the said r. 6(l) has licensed such an appeal still to be heard by a Judge in Chambers. That, to me, is the clear intention of O. 49 r. 6(1), SCR, and "... any other construction would (certainly) result in nullifying the purport and effect of (O. 49 r. 6(l), SCR)."

Rule 6(l) of the said O. 49, speaks of "any decision" made by the lower Court "other than a decision made after trial". It is without doubt that, the said sub-rule (1) addresses itself to all interlocutory decisions, be it from a preliminary objection (as in this appeal before me) or after hearing full submission on merit (please see, unreported decision in Civil Suit No. D3-23-277-87, decided by V.C. George, J (as be then was) on 27 April 1989, in the case of *Citibank, N.A. v. Lee Chew Keok(f) & Anor*. By that decision, and by virtue of O. 49 r. 1, "decision" against "preliminary objection" or "on merit" in an "interlocutory matter" or a "summary proceedings" such as O. 26A, SCR application, is therefore an appellable matter under the said r. 6(1). It is in that aspect that it is important to appreciate the distinction between an "interlocutory decision", as in the appeal before me, and that made "after a full trial" as contemplated by r. 2(4) or 3(2) of O. 49, referred to by O. 55 r. 2(l) HCR. Only by fully appreciating that distinction can the procedure provided and to be followed strictly, as explained earlier, be correctly synchronised with the legislative intention of effectively introducing O. 49 r. 6 on 1 August 1993, vide PU(A) 193/93 in respect of any appeal against O. 26A SCR decision.

Before 1 August 1993, the procedure for appeals from Subordinate Courts to High Court, was governed by O. 49 rr. 2, 3 and 3A SCR, irrespective of whether an appeal arose from a "full trial" or out of "a summary proceedings". In that context, the meaning of the word "trial" has been recognised by the then Federal Court in the *Koperasi Serbaguna's* case, *supra*, as "the final determination of the main suit and not determination of any interlocutory application therein."

"Any interlocutory application therein", in the context of the appeal before me, thus includes preliminary objection raised by the appellant/defendant at the hearing of O. 26A application in the Court below. In the light of what has been said above, it matters not, whether or not the Memo was filed together with the record of appeal, if the decision of the *Syarikat Kayu's* case, *supra*, was decided before 1 August 1993. If that was the situation, the lower Court in which the notice in Form 140 was filed will have no alternative but to supply to the appellant both the relevant grounds of judgment and notes of evidence. In other words, r. 2 and 3 (if unrepresented) or r. 2 and 3A (if represented) of O. 49, SCR, must therefore be complied with. Thus by O. 55 r. 2(l), HCR the Memo in Form 113A must therefore be filed within 14 days of receiving Form 141 under O. 49, r. 2(4) or r. 3(4) of the SCR. That must have been the legislative intention of the interaction of both O. 49 r. 6, and O. 55 r. 2

of the HCR. Failure to comply with such intention, will therefore render the appeal record to be incomplete. Unless remedied, the appeal with such defective record can therefore be justifiably dismissed with costs.

However, as rightly pointed out by the Court of Appeal in the said *Yupaporn's* case, with the object "to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower Courts", r. 6 was introduced to O. 49, vide PU(A) 193/93, which came into effect on 1 August 1993. That view or similar view to that effect, was not expressed or observed by his Lordship in the said *Syarikat Kayu's* case. If that same view was taken by his Lordship to be his prime consideration in applying the relevant procedural rules in line with the intended legislative intention of inserting r. 6 to O. 49, SCR, in all probablities, he may have a different interpretation as to the need or otherwise of filing the Memo into effect in respect of an appeal arising from an O. 26A, SCR application.

If O. 55 r. 2(l), HCR is to be examined more closely, it can be seen clearly that, the need to file the Memo as stated thereto, only applies to appeals arising from matters in relation to O. 49 rr. 2(4) and 3(2) of the SCR where Form 141 has to be issued by the Court where the notice of appeals in Form 140 was filed. In practice, since the amendment to O. 49, SCR was effected, the Court concerned will inform the appellant, either on its own or when asked for, that, neither the notes of evidence nor the grounds of judgment will be issued to the appellant; that is to say, Form 141 will not be issued by such Court since 1 August 1993. Without being supplied with such materials, I cannot visualize how the Memo can be prepared, save aside to file the same as required by O. 55 r. 2(l) of the HCR. It must have been tailored to that situation when SCR was amended by inserting r. 6 to O. 49, the phrase "notwithstanding anything contained in this Order" was included in sub-rule (1). of the said r. 6. By so doing, it provides a special procedure in respect of any appeal against any "summary" or "interlocutory" decision of a Subordinate Court, independent from those referred to by either r. 2(4) or r. 3(2) of O. 49 of the SCR.

By O. 1 r. 3 of the SCR, it provides that:

> Nothing in these rules shall affect any special mode of procedure prescribed by any written law for particular cause and matter.

That "special mode of procedure" prescribed by r. 6, clearly dispenses the need to issue the notice in Form 141, and hence the requirement to file the Memo as reflected by sub-rule (3) of the said r. 6 of the SCR. All an appellant has to do, is to comply strictly with all the requirements stipulated in sub-rules (2) and (3) of r. 6 of the O. 49 for his appeal to be heard by a Judge in Chambers under sub-rule (1) of the same rule.

From the above discussion, if one were to apply the cardinal principle of interpretation found in the maxim of *'generalibus specialia derogant'*, it would be obvious that, the legislative intention in r. 6 of O. 49 must necessarily, after 1 August 1993, excludes the operation of either r. 2(4) or 3(2) of the same rule. The said rule of construction was clearly stated by Gopal Sri Ram, JCA, in the case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Har Teng @ Tan Tien Chi & Anor.* [1995] 2 AMR 969, at page 1013, the following:

> ... the rule of construction expressed in the maxim *'generalibus specilia derogant*, that is, where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

Thus, in the circumstances, it is my most humble conclusion that, the question of "abrogating the requirement of O. 55 r. 2 of the HCR" by not filing the Memo in relation to O. 49 r. 6(3) of the SCR, does not arise at all. On the other hand, if that requirement is to be construed as mandatory, then it would amount to nullifying the very legislative intention of introducing r. 6 to O. 49 of SCR, and that will certainly be against the established principle of the rules of construction of any particular provision of a statute or a subsidiary legislation as discussed earlier.

In conclusion and on the premises above, it is my most humble and considered conclusion, and with utmost respect to Mr. Justice Richard Malanjum, that, there is certainly no need to file the Memo in respect of any appeal arising from an O. 26A, SCR application after 1 August 1993. Since my disagreement with his Lordship is on his analysis of substantive issue which was fully endorsed by the Court of Appeal in the said *Yupaporn's* case, *supra*, it is therefore again my most humble and considered opinion that, the question of whether or not I am bound by the principle of *"stare decisis"* does not arise. On that basis and with the aforesaid conclusion in mind, I therefore disallowed Miss Chew's objection and fixed the date for the hearing of the substantive appeal accordingly.

Reported by W.A. Sharif